In the Supreme Court
of the United States

October Term, 1959

No. 43

WILLIAM R. FORMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF THE PETITIONER

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OPINIONS BELOW

There was no Opinion in the United States District Court.

The Opinions of the Court of Appeals for the Ninth Circuit are reported in:

259 F. 2d 128 (R. 1923 to 1934).
261 F. 2d 181 (R. 1936 to 1938).
264 F. 2d 955 (R. 1941 to 1943).

STATEMENT OF JURISDICTION

On September 15, 1958, the United States Court of Appeals for the Ninth Circuit rendered a judgment reversing the judgment of conviction entered in the United States District Court for the Western District of Washington, Southern Division, and remanded the cause *with directions to enter judgment for the Appellant*, Petitioner herein (R. 1923).

On October 27, 1958, on petition of the Government, the Court below entered an Order modifying the aforesaid judgment by *remanding the cause for a new trial* instead of a judgment of acquittal (R. 1936).

On February 26, 1959, the Court below denied Appellant's (Petitioner's) Petition for Re-hearing (R. 1939).

On March 18, 1959, the Petition for Writ of Certiorari was filed in this Court.

On May 4, 1949, Petition for Writ of Certiorari was granted (R. 2023).

Petitioner seeks a review of the decisions rendered October 27, 1958 and February 26, 1959, *only insofar as they amended the judgment of September 15, 1958, by remanding for a new trial instead of a judgment of acquittal.*

Jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States, insofar as it provides:

> " * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Section 371, Title: 18 U.S.C.A., provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . ."

Section 7201, Title: 26 U.S.C.A., (Sec. 145(b), Internal Revenue Act), provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . ."

Section 6531, Title: 26 U.S.C.A., provides:

> ". . . the period of limitation shall be 6 years—
>
> . . . . . .
>
> "(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof."

Section 2106, Title: 28 U.S.C.A. provides:

> "§ 2106. *Determination*
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order

of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

QUESTIONS PRESENTED FOR REVIEW

1. Where the United States District Court submitted the case to the Jury on peremptory instruction that prosecution for the primary conspiracy to attempt to evade the tax was barred by the statute of limitations unless the Jury found that a subsidiary conspiracy was entered into (of the character described in *Krulewitch v. U. S.*, 336 U.S. 440, and *Grunewald v. U. S.*, 353 U.S. 391), which would prolong the life of the primary conspiracy, and the United States Court of Appeals determined that such a subsidiary conspiracy was not established and by reason thereof, it was

"error to permit the case to go to the Jury,"

and directed the entry of a judgment of acquittal, can the United States Court of Appeals thereafter direct a new trial because

"the case might have been tried" on an "alternative theory"?

2. Does the judgment and order directing a new trial, instead of a judgment of acquittal, subject Petitioner to double jeopardy and constitute violation of the Fifth Amendment to the Constitution of the United States under the conditions prevailing in this case?

3. Does the judgment, ordering a new trial instead of directing the entry of a judgment of acquittal, con-

stitute an "appropriate judgment" and is it "just under the circumstances" of this case?

4. Is the direction for a new trial justified where the Petitioner was entitled, as a matter of law, to the entry of a judgment of acquittal in the United States District Court at the close of the entire case on the ground that the prosecution was barred by the statute of limitations and the United States Court of Appeals so determined?

5. Can the Court below, after reversing the conviction because "it was error to permit this case to go to the jury", remand the case for a new trial because "the case might have been tried" on an "alternative theory" different from the theory upon which the case was tried and submitted to the jury where the Government:

(a) did not in the Trial Court object or take exception to the instructions embodying the theory on which the case was submitted;

(b) did not request that the case be submitted upon the alleged "alternative theory" or any other theory;

(c) did not comply with Rule 30 of the Federal Rules of Criminal Procedure;

(d) did not in its brief in the United States Court of Appeals assign, as error or contend, that the case was submitted on an erroneous theory or that it could have been submitted on an anternative theory;

(e) did not in oral argument make such contention; and

(f) raised the question, for the first time, by petition to modify the decision after the Court rendered its decision reversing the conviction

with direction for the entry of a judgment of acquittal?

6. Can the Government, Appellee, *in a criminal case*, who cannot cross-appeal, assert error, if any there be, with respect to the instructions and seek a new trial by reason thereof?

7. Has the Court below so far departed from the accepted and usual course of judicial proceedings resulting in denial to the Petitioner of the constitutional guarantee against double jeopardy as to call for the exercise of this Court's power of supervision?

8. Did the Court below err in its Modification Opinion in holding that

> "the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution." (R. 1937).

STATEMENT OF THE CASE

In the tax years 1942 to 1945, Petitioner Forman and one, Armador A. Seijas, were partners doing business under four specifically named Partnerships operating pin ball machines. These machines were located in various establishments, such as restaurants, taverns, drug stores, etc. under an arrangement with the owners of the location by which the income from the machines was to be divided equally between the Partnerships and the owners of the locations. The maintenance of four Partnerships was made necessary by the fact that there were limitations upon the number of machines that could be operated by any one licensee under municipal and county licenses.

During that period and subsequent thereto, Forman and Seijas were partners in other ventures, to-wit, theater operations, real estate, concessions, etc. The case does not involve any income derived from these other partnership operations.

Count XV of the indictment (the only count here involved) charges that Forman and Seijas conspired to attempt to evade *Seijas'* income tax on a portion of the income derived from the pin ball machine business, which is described as "*hold-out*" income, during the years *1942 to 1945* inclusive conducted in the *four* pin ball *partnership* names. The contention is that when collections were made from the machines, a portion of the money collected was withheld from the owners of the locations and the balance only was divided with the

location owners (referred to throughout the trial as "hold-out" income); that the part withheld was divided equally between Forman and Seijas; that they did not report this particular income in the partnership information returns for said years; that Seijas did not report his share of the "hold-out" income in his individual tax return (Indictment, 3 to 6).

The alleged "hold-out" income derived by the four pin ball partnerships in the tax years 1942 to 1945 is the only income involved under the indictment.

The indictment only charges conspiracy to attempt to evade *Seijas' tax liability*. It does not charge conspiracy to attempt to evade Forman's (Petitioner's) tax liability.

The indictment divided the conspiracy into four parts, paragraphs A, B, C and D (R. 4, 5).

Paragraph A charged conspiracy to violate Section 54 of the Internal Revenue Code by keeping false records and paragraph B charged conspiracy to violate Section 1001 of the Criminal Code by causing to be filed false partnership information returns.

These two paragraphs were withdrawn from the consideration of the Jury and are not now involved in the case (R. 1806).

Paragraph C (R. 5) charged conspiracy to violate Section 145(b) of the Internal Revenue Code by attempting to evade a part of Seijas' income tax on the aforesaid income, but does not specify or describe any means by which the attempt was to be accomplished.

Paragraph D (R. 5) charges that they conspired to

violate Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code (jointly) by furnishing Officers of the Treasury Department false books and records and false financial statements and by making false statements,

> "for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability *of Armador A. Seijas and his wife*, Betty L. Seijas, for the yars 1942 to 1945, inclusive."

The conspiracy, charged in paragraph D, *does not charge conspiracy to attempt to evade Forman's* (Petitioner's) *tax liability*. The composite charge of conspiracy to violate Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code is subject to different statute of limitations. The former is subject to a *three year statute of limitations* (Sec. 3282, Title 18 U.S.C.A., prior to 1954 Amend.), while the latter is subject to a six year statute of limitations (Sec. 6531, Title 26 U.S.C.A.).

The Government's case established affirmatively and beyond question that the so-called "hold-out" practice was ended December 27, 1945 (R. 1079-1080); that in November, 1945, the Partnership sold part of its business to one Schneiderman (R. 1297) and on August 8, 1946, Forman sold his one-half interest in the remaining Partnership's business (less 1%) to one Henry T. Morin and transferred his remaining 1% interest to Seijas to be effective as of September 1, 1946 (R. 1310 and 1311). Thereafter, the pin ball business was continued by the

Partnership composed of Seijas and Morin. New books of account were set up for the new Partnership (R. 1237) and thereafter, the partnership information returns were filed by the new Partnership (Pl. Exs. 17, 18, 19, 20 and 21, R. 152).

After Forman sold his interest in the Partnership to Morin in August 1946, he ceased to have anything to do with the management or operation of the pin ball machine business (R. 1258) and immediately and continuously thereafter engaged in the business of acquiring and operating moving picture theaters in Washington, Oregon and California, and the bookkeeper got all instructions from Seijas and Morin (R. 1252, 1258).

After Forman sold his one-half interest to Morin, he entered into an agreement with Seijas by which Forman was to have a secret one-half interest in Seijas' 51% interest in the pin ball business of the new Partnership of Seijas and Morin. Forman contends, and there is a great deal of documentary evidence to support him, that that transaction was abandoned and that he loaned to Seijas one-half of the money he received from Morin for the sale of his one-half interest. There is an issue of fact upon that matter, but the issue is irrelevant to any question with which the Court is presently concerned.

Renstrom, the bookeeper, testified that after the sale to Morin, all instructions were given to him by Seijas and Morin; that the profit and loss and balance sheets were then given to Seijas and Morin; that he gave no information to Forman; that he did not give Forman any copies of Partnership Information Returns

(R. 1252); no checks were issued to Forman from the pin ball partnership (R. 1253) and the books did not show that Foreman had any interest in the Partnership (R. 1237).

Meyers, the one who made the collection of "hold-out" income, testified that the "hold-out" practice was discontinued before Forman sold out to Morin (R. 1080-1081); that Forman had no further interest in the business to his knowledge (R. 1081); that he had no further connection with Forman (R. 1089) and he thereafter took his instructions from Seijas and Morin (R. 1089).

Forman did not participate in the management or operation of the business of the new Partnership and the income from the new Partnership is in no way involved in the case at bar.

Partnership returns for the pin ball machine operations for the tax years 1942 to 1945 were filed each year. The last one, for the year 1945, was filed in March 1946, and the partners Seijas and Forman filed their individual returns for said years. The Seijas' individual return for 1945 was filed March 15, 1946 (Pl. Exs. 2 and 3) (R. 152, 1808).

Each Partner had his own individual tax returns prepared by his own accountant. Seijas' returns were prepared by his accountant and by himself in *Seattle, Washington*, and Forman's returns were prepared by his accountant in *Portland, Oregon*, who handled Forman's accounts for his own enterprises.

The first thirteen counts of the indictment charged Seijas only with the substantive offense of attempted tax evasion. Counts I to VIII inclusive involved the tax years *1942 to 1945* and Counts IX to XIII involved the tax years *1946 to 1948*.

Count XIV charged Seijas only with the substantive offense of violation of Section 1001 of the Criminal Code by making false statements and submitting false records to Internal Revenue Agents.

Petitioner Forman was not charged with any substantive offense.

Prior to the trial on Count XV, Seijas was tried and convicted on Counts IX to XIII inclusive involving tax years 1946 to 1948.

Prior to the commencement of the trial on Count XV (conspiracy), Seijas pleaded guilty to that count and on motion of the Government, the remaining substantive counts were dismissed. Thereafter, the trial on Count XV (conspiracy) was continued against Forman alone and Seijas became the Government's principal witness.

Prior to trial, Petitioner Forman moved to dismiss Count XV of the indictment on the ground, among others, that prosecution was barred by the statute of limitations (R. 21). The motion was denied (R. 66, 67).

At the close of the Government's case, Petitioner moved for a judgment of acquittal on the ground, among others, that prosecution was barred by the statute of limitations (R. 95, 96, 1654). The motion was denied (R. 1655).

At the close of the entire case, Petitioner moved for a judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (R. 1762). The motion was denied.

After judgment of conviction was entered, Petitioner renewed the motion for judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (R. 101). The motion was denied (R. 103).

In submitting the case to the Jury, the District Court charged (with respect to the statute of limitations) as follows (R. 1807-8):

> "'If you find that the defendants Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman' *not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one.* You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to *conceal* the commission of the offense. You would have to be convinced beyond a reasonable doubt that they *actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy.*
>
> "*If you find that the defendants* only conspired

to attempt to evade the tax liability of defendant Seijas and his wife and *did not form the additional conspiracy* to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, *was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946*, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

"If you find that there was no subsidiary conspiracy to conceal, as I have just outlined it to you, but acts of concealment were thereafter *committed as an afterthought* and were *conceived after the filing of the returns in March, 1946*, then, of course, your verdict must be for the defendant Forman."

In this connection, the Court also charged (R. 1803):

"*Mere acts of concealment* of a prior concluded conspiracy, which did not include a specific and distinct agreement to conceal, *occurring subsequent to final termination of the conspiracy* as to a particular defendant, *do not constitute overt acts* chargeable to such defendant and *are not to be considered in applying the statute of limitations* to prosecution of such defendant."

On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of conviction was reversed and remanded

"with directions to enter judgment for the Appellant." (R. 1935) (259 F. 2d 128).

The reversal was on the ground that prosecution was *barred by the statute of limitations*. The Court determined that there was no evidence of an

"express original agreement among the conspirators

> to continue to act in concert in order to cover up, for their own protection, traces of the crime after its commission"

of the character deemed necessary in the *Krulewitch* and *Grunewald cases*. Upon that theory, the Court of Appeals held:

> "It was error to permit this case to go to the Jury."

The Government filed a petition for modification of the decision of the United States Court of Appeals by remanding for a new trial instead of remanding with directions for the entry of a judgment of acquittal.

On October 27, 1958, the United States Court of Appeals rendered a Per Curiam Opinion in which it modified the Opinion formerly rendered

> "so as to provide that the judgment is reversed and the cause remanded for a new trial." (R. 1938) (261 F. 2d 181).

On February 26, 1959, the United States Court of Appeals denied Appellant's (Petitioner's) petition for a re-hearing (R. 1939 to 1940) (264 F. 2d 955).

The modification was based on the contention adopted by the Court that ". . . *the case might have been tried on this alternative theory* . . ." (R. 1937) although the Government did not object to the theory on which the case was submitted; did not request submission on the alleged alternative theory; did not comply with Rule 30 of the Federal Rules of Criminal Procedure; did not raise the question in the brief or oral argument in the Court below and presented the alleged alternative theory for the first time by its petition for a new trial.

The Court below did not, in its Modification Opinion, and or the Opinion on re-hearing, reverse itself in respect to any issue decided in its original Opinion. In effect, it merely decided that the Government should be given "another go at this citizen" so that he could be tried again on the alleged "alternative theory."

The primary question is, does the Modification Opinion subject Petitioner to double jeopardy under these circumstances?

SUMMARY OF THE ARGUMENT

I.

(a) Granting a new trial on the Government's motion after the Court of Appeals rendered a judgment reversing the judgment of conviction and directing the entry of a judgment of acquittal because there was no evidence warranting submission of the case to the Jury, constitutes a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

(b) The Government's petition for a new trial constituted, in legal effect, an original proceeding for a new trial in the Court of Appeals which the Court had no jurisdiction to entertain. The Court of Appeals is a Court of review and not a Court of original jurisdiction.

(c) After the Court of Appeals rendered a judgment reversing the judgment of conviction with direction to enter a judgment of acquittal, it was not "just" or "appropriate" to modify the decision and direct a new trial

on the sole ground that the case "might have been tried upon this alternative theory" when the Government did not, in the District Court, request submission of the case on the alleged "alternative theory": did not object or except to the theory embraced in the instructions as given and did not, in its brief in the Court of Appeals or in oral argument, contend that the case might have been tried on such alternative theory, but advanced the contention, for the first time, in the petition for a new trial.

(d) Section 2106, Title 28, U.S.C.A., must *in criminal cases* be construed with and limited by the Double Jeopardy Clause of the Fifth Amendment and as so construed and limited, does not confer discretionary power on the Court of Appeals to direct a new trial *in a criminal case* after it has adjudged that the defendant was entitled to a judgment of acquittal as a matter of law for lack of evidence sufficient for submission of the case to the Jury.

Construing the statute so as to confer discretionary power to direct a new trial in a criminal case under these circumstances, would render Section 2106 unconstitutional for violation of the Double Jeopardy Clause of the Fifth Amendment.

(e) The Constitutional protection against double jeopardy, the denial of the right to the Government to move for a new trial in a criminal case either in the District Court or in the Appellate Court, and the denial to the Government of the right of appeal in criminal cases, make it mandatory that the Government should

in the first instance, try the defendant on all available theories which could have been lawfully submitted to the Jury and precludes the Government from seeking a new trial after it has acquiesced in the theory upon which the case was submitted and sought affirmance in the Court of Appeals upon that theory.

(f) The fortuitous circumstance that the District Court erroneously failed to render judgment of acquittal under the circumstances in this case, should not deprive a defendant of the constitutional protection against a second trial for the same offense.

(g) The Court below erred in the Modification Opinion when it directed the new trial on the authority of the *Grunewald case* because:

1. In *Grunewald*, the defendant, as appellant, (not the Government) sought the new trial. In the case at bar, the Government is seeking a new trial although denied that right by law.

2. In *Grunewald*, the alternative theory was in fact submitted to the Jury. The Court only found that the instructions did not adequately separate the two theories in the instructions. In the case at bar, the Government did not request submission of the alleged "alternative theory."

3. In *Grunewald*, the defendant raised the issue by appropriate exceptions in the District Court and by assignment of error in the Court of Appeals. In the case at bar, the Government did neither.

4. In *Grunewald*, the defendant, as Appellant, had

the right, as a matter of law, to raise the issues in the District Court, in the Court of Appeals and in the Supreme Court, whereas, the Government has no such rights.

II.

(a) The original Opinion was correct. It was in accordance with the principles laid down in the *Grunewald case*, and gave effect thereto.

(b) The Modification Opinion, insofar as it projects the alleged alternative theory, dissipates the principles established in *Grunewald* in which the Court held that acts of concealment, after an offense has been committed, cannot postpone the operation of the statute of limitations and that evidence of commission of overt acts does not constitute evidence of the conspiracy to conceal.

(c) There is no evidence in the record to sustain the alleged alternative theory.

(d) The Court below predicated the alleged alternative theory on the alleged commission of overt acts which would prevent the commencement of the running of the statute of limitations, although there was no evidence in the record that the said acts were committed pursuant to an antecedent conspiracy to make false statements and submit false records.

(e) There is no evidence to establish the commission of the alleged overt acts.

ARGUMENT

I

The Modification Opinion Directing a New Trial Instead of Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy under the Circumstances of This Case.

PRELIMINARY STATEMENT

The decision of the United States Court of Appeals for the Ninth Circuit, rendered September 15, 1958 (R. 1924) (259 F. 2d 128), reversed the judgment of conviction and remanded with directions for the entry of a judgment for the Appellant (R. 1935). The decision was based primarily on the ground that the prosecution was barred by the statute of limitations. The District Court submitted the case to the Jury on instructions that the statute of limitations commenced to run when Seijas' last individual tax return was filed, to-wit, March 15, 1946, which was more than six years prior to the return of the indictment and prosecution was barred *unless* the Jury found that there was a subsidiary agreement of the character described in the *Krulewitch* and *Grunewald* cases, to-wit:

> "an express original agreement among the conspirators to continue to act in concert in order to cover up for their own protection, traces of the crime after its commission." (R. 1334).

Pertinent quotation from the instructions are printed at pages 13-14 of this brief.

The Court of Appeals determined that there was no

evidence in the record of such a subsidiary agreement and that it was error to submit the case to the jury. It reversed on that ground and remanded with directions to enter judgment of acquittal (R. 1923-1935) (259 F. 2d 128).

The Government petitioned for modification of the judgment to remand for a new trial instead of a judgment of acquittal on the ground that the case *might have been submitted on an "alternative theory"* which would have extended the operation of the statute of limitations, to-wit, that the conspiracy contemplated the commission of acts of concealment—making false statements and submitting false records to Treasury Agent—after the filing of false returns.

The Court of Appeals granted the petition for modification because:

> "the case might have been tried upon this alternative theory." (R. 1936 to 1938) (261 F. 2d 181).

The Government did not, in the District Court, object or take exception to the theory on which the case was submitted to the Jury and *did not request any instructions for the submission of the case to the Jury on the alleged "alternative theory,"* and did not comply with Rule 30 of the Federal Rules of Criminal Procedure.

The Government did not, in its brief or in the oral argument in the Court of Appeals, make any contention that the case should, or might have been submitted on the alleged "alternative theory" or that any error was committed in the instructions *as given.*

The contention that the case might have been submitted on the alleged "alternative theory" was advanced, for the first time, in the Government's petition to the Court of Appeals for the modification of the Opinion by remanding for a new trial instead of for the entry of a judgment of acquittal.

In the Modification Opinion Decision, the Court did not determine that it was in error in any respect in its former decision and, in particular, it did not determine that it erred in determining that there was no evidence that warranted submission of the case to the Jury on the issue whether there was "an express agreement to act in concert" which would have prolonged the operation of the statute of limitations. The Court of Appeals did not reverse itself in any respect upon any issue determinative of the ultimate disposition of the case *upon the instructions as given.* It merely determined that the case should be tried again on the alleged "alternative theory" (then advanced for the first time), and for that reason alone, remanded for a new trial.

We submit that the petition for a new trial was, under these circumstances, in legal effect, *an original proceeding in the Court of Appeals for a new trial after the Court adjudged the Petitioner was entitled, as a matter of law, to judgment of acquittal* and the Modification Opinion, granting the new trial, subjected Petitioner to double jeopardy in violation of the Fifth Amendment.

a.

Decisions Bearing on Questions of Double Jeopardy.

In *Palko v. State of Connecticut*, 302 U.S. 319, 58 S. Ct. 149, Justice Cardozo said:

> "It (Fifth Amendment) forbade jeopardy in the same case if the new trial was *at the instance of the government* and not upon defendant's motion." (Emphasis supplied).

In *Sapir v. U. S.*, 348 U.S. 373, the Court of Appeals reversed the conviction with directions to dismiss the indictment because the evidence did not warrant submission of the case to the Jury (216 F. 2d 722). The Government then petitioned to modify the judgment by directing a new trial instead of a dismissal of the indictment as in the case at bar. The Court of Appeals granted the Government's petition *and this Court granted a writ of certiorari.*

This Court, in a Per Curiam Opinion, held:

> " 'The petition for writ of certiorari is granted.
>
> " 'We believe that the judgment of the Court of Appeals of October 20, 1954, 216 F. 2d, 722, reversing and *remanding* this cause *with instructions to dismiss* the indictment *was correct.* It is not necessary for us to pass on the question presented under its subsequent judgment of November 17, 1954, directing a new trial. We vacate the latter judgment, which directed the new trial, and we reinstate the former one which instructed the trial court to dismiss the indictment.' "

Mr. Justice Douglas, in a concurring Opinion, said:

> " 'The granting of a new trial after a judgment of acquittal *for lack of evidence* violates the com-

mand of the Fifth Amendment that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

"The correct rule was stated in Kepner v. United States, 195 U.S. 100, at page 130, 24 S. Ct. 797, at page 130, 24 S. Ct., 797, at page 805, 49 L. Ed. 114, 'It is, then, the settled law of this court that former jeopardy includes 'one who has been *acquitted*, by a verdict duly rendered * * * .' *If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen.* If, as in the Kepner case, the trial *judge had rendered a verdict of acquittal*, the guarantee against *double jeopardy would prevent a new trial* of the old offense. I *see no difference when the appellate court orders a judgment of acquittal for lack of evidence.*

. . . . . .

"'But an acquittal *on the basis of lack of evidence* concludes the controversy, as the Kepner case holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial.'" (Emphasis supplied).

In its Opinion, denying Appellant's (Petitioner's Petition for Re-Hearing (R. 1940) (264 F. 2d 955), the Court of Appeals attempted to distinguish the case at bar from the *Sapir case*. It said:

"In the Sapir case the Court of Appeals held that the evidence 'did not establish an essential element of the offense charged' and that the trial court should have entered a judgment of acquittal.

. . . . . .

"Thus, in the words of Mr. Justice Douglas, the appellate court ordered 'a judgment of acquittal for lack of evidence.'

"But in the case before us we did no such thing. We held that the case was submitted to the

> jury on an impermissible theory. The jury was simply not properly instructed."

This was an erroneous construction and interpretation of the Court's original and modification Opinions.

The Court below did not determine in either Opinion that the instructions, as given, were erroneous. It held that there was no evidence warranting submission of the case to the Jury *on the instructions as given*. The Modification Opinion only decided that additional instructions "*might*" have been given that would have submitted the case on the alleged "*alternative theory*." The Court never departed from its original determination that under the *theory embraced in the instructions as given*. Petitioner was entitled to an acquittal.

The error was not in the instruction. The error was in submission of the case to the Jury at all because of the lack of evidence under the instructions as given.

The ruling that the case "might have been tried upon this alternative theory," does not establish that the Jury was not properly instructed. The original Opinion establishes that there was no error in the instructions upon the theory on which the case was tried and submitted to the Jury. The Court said, in effect, that the case might have been tried and submitted on an alternative theory *if the Government had requested submission on that theory*. The Court did not, and could not, rule that the District Court erred in the failure to submit that theory (if, in fact, there was a failure) because no such request was made and no exception taken to the instruction as given.

The Petitioner did not, by his appeal, seek a new trial in connection with the contention that he was entitled to a judgment of acquittal for lack of evidence to go to the Jury on an issue determinative of the case. He sought only a reversal with directions for the entry of judgment of acquittal in that connection. Petitioner did not invite a new trial on this issue.

In *Karn v. United States*, 158 F. 2d 568 (9th Cir.) the Court held:

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal. *The right of appellant to a verdict of acquittal fully matured when he made his motion.* To remand the case with directions to grant a new trial would, in our judgment, be a *serious invasion of rights which accrued to him* in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind.
>
> . . . . . .
>
> "The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

In Footnote 2, the Court held:

> ". . . The power of an appellate court *to direct the lower court to do what in law it should have done* was admitted in the early case of Ballew v. United States, 160 U.S. 187, . . . the trial judge, when faced with a motion for a directed verdict, . . . must decide a *question of law*. . . . The erroneous decision of a trial judge cannot convert that question of law into a question of fact. It remains a question of law properly to be decided by the appellate court,

and when so decided (as it is here) *there remains nothing to be done by the district court save enter a judgment of acquittal*. For a particularly enlightening discussion see (citing many cases)." (Emphasis supplied).

The original Opinion of the Court of Appeals merely directed the District Court to do that which it should have done in the first instance as a matter of law.

The Modification Opinion subjects Petitioner to a second trial for the same offense notwithstanding the fact that he was entitled, as a matter of law, to a judgment of acquittal in the District Court at the conclusion of the case.

Petitioner should not be stripped of the constitutional protection against double jeopardy by the fortuitous circumstance that the District Court erroneously failed to do what it should have done in the first instance as a matter of law.

The Defendant's right to judgment of acquittal "matured" at that time (*Karn v. United States, supra*) and became a vested right. When the Court of Appeals held that the District Court committed error in submitting the case to the Jury and in not granting a judgment of acquittal, it established the vested right of Petitioner *as of the time he moved for a judgment of acquittal in the Court below*.

In *Abbate v. United States*, — U.S. —, 79 S. Ct. 666, Justice Brennan (in the separate Opinion rejecting the Government's alternative theory) said:

"The basis of the Fifth Amendment protection

against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea * * * is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * *.' Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199. In short, 'the *prohibition is not against being twice punished, but against being twice put in jeopardy* * * *' United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192, 1194, 41 L. Ed. 300.

. . . . . .

"Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

. . . . . .

"The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused." (Emphasis supplied).

In *Bartkus v. People of State of Illinois*, — U.S. —, 79 S. Ct. 676-701, Justice Black, in the dissenting Opinion, concurred in by Chief Justice Warren and Justice Douglas, said in the footnote:

"The Federal Bill of Rights did not, of course, differentiate between *re-trials after acquittal and retrials after conviction;* it banned both."

and in the body of the Opinion he said:

"The test, I submit, must be fashioned to secure the fundamental protection of the Fifth Amend-

ment "that the (Federal Government) with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * * .'"

In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, the Court held:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . .
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> . . . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the *Government cannot secure a new trial* by means of an appeal *even though an acquittal may appear to be erroneous.*" (Emphasis supplied).

In *Kepner v. United States*, 194 U.S. 100, the Court held:

> "*The protection is not*, as the court below held, *against the peril of second punishment, but against being again tried for the same offense.*
>
> . . . . . .
>
> "So in the case of *People v. Webb*, 38 Cal 467, . . .

in the course of a well-considered opinion it was said: . . . 'No case has been called to our attention . . . *where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury,* . . .' (Emphasis supplied).

The Modification Opinion violates the letter and the spirit of the Double Jeopardy Clause of the Fifth Amendment and ignores the purpose of the Amendment as expressed in the Opinions just referred to. The Government is to have "another go at this citizen" because the District Court erroneously failed to grant him the judgment of acquittal which "accrued" to him at that time.

The legal effect of the Government's contention, and the Modification Opinion, is that the Government can seek a conviction on one legal theory, seek affirmance of that conviction upon that theory in the Appellate Court, and when the Appellate Court reverses *for lack of evidence sufficent for submission to the Jury,* and determines that the Defendant was entitled to acquittal, it can then seek another trial of the Defendant upon another or "alternative theory." We submit that this constitutes a violation of the Defendant's constitutional protection against double jeopardy.

The whole scheme of criminal procedure is geared to the Double Jeopardy Clause of the Fifth Amendment. Thus the Government is denied the right to move for a new trial in a criminal case even though the judgment of acquittal may be erroneous. It is denied the right

to appeal from a judgment of acquittal. It is denied the right to cross-appeal when the Defendant appeals from a judgment of conviction and cannot assign errors on such appeal.

The constitutional protection against double jeopardy and the denial to the Government of the aforesaid rights, compels the conclusion that the Government must try its case in the District Court and seek submission of the case to the Jury *on all available theories*. The theory as embraced in the instructions, as given, is as to the Government, the law of the case.

The Government cannot under the Double Jeopardy Clause acquiesce in the trial of Defendant on one theory and when defeated in the District Court or Court of Appeals try him on another theory.

The Double Jeopardy Clause and the denial of the aforesaid rights to the Government, is inconsistent with, and precludes, the right of the Government to apply to the Court of Appeals for a new trial on an "alternative theory" when it has failed to advance and seek submission of that theory in the District Court and has sought to sustain the conviction on the theory on which the case was tried and submitted.

b.

The Petition for Modification Was, in Legal Effect, an Original Proceeding in the Court of Appeals for a New Trial Which It Had No Jurisdiction to Entertain.

Courts of Appeals are Courts of limited jurisdiction. They have only appellate, as distinguished from original, jurisdiction. Title 28 USC 1291. The Government's peti-

tion to amend the judgment so as to direct a new trial in essence was a motion in the Court of Appeals for a new trial on "another theory."

Rule 33 of the Federal Rules of Criminal Procedure provides:

> "The court may grant a new trial to a defendant . . ."

There is no provision authorizing the Government to move for a new trial, nor is there any statute or rule of Court granting the Government the right of appeal from a judgment of acquittal, whether entered on a motion or upon verdict of the jury, and the Government has no right to assign error upon an appeal by the defendant upon a judgment of conviction. (18 U.S.C.A. 3731); *Carroll v. United States*, 354 U.S. 394; *Umbriaco v. United States*, 258 F. 2d 625 (9th Cir.).

The Court of Appeals had no jurisdiction to entertain the petition for a new trial on an "alternative theory" after it had decided that Petitioner was entitled to judgment of acquittal. It is not a Court of original jurisdiction.

In *Ex Parte United States*, 101 F. 2d 870 (7th Cir.) the District Court granted judgment of acquittal for lack of evidence after a verdict of guilty pursuant to reservation of decision on the motion for judgment of acquittal made at the close of the entire case. The Government *moved to modify* the Order *by directing a new trial instead of judgment of acquittal.* The Court denied the petition and the Government sought a writ of mandamus in the Court of Appeals to compel the entry of such Order. The Court held:

> "To agree with petitioner that the prosecution is entitled to a new trial as a matter of right, after the issues have been fully tried in a trial by judge and jury and after the government has failed to prove its case against the defendants, is *a monstrous penalty to impose upon the defendants.* To grant the prosecution a new trial, after a judgment of dismissal has been rendered pursuant to its reservation of the power to wrest the case from the jury if the case turned on a purely legal question, *is to create a right that never before existed.* The creation of such a right in this case would come very close to violating the ancient doctrine codified in our Constitution that the accused shall not twice be put in jeopardy of life and limb for the same offense." (Emphasis supplied).

When the Goverment petitioned for a new trial after the judgment of conviction was reversed, and remanded for judgment of acquittal, *it initiated, in legal effect, an original proceeding* in the Court of Appeals without legal authority.

This is particularly true in the case at bar because the Government had not, at any time, until it filed its petition for a new trial, asserted error by reason of the failure to submit the alleged alternative theory to the Jury. It was an entirely new concept, presented at that time and at that stage of the case, in violation of *Rule 30 of the Federal Rules of Criminal Procedure,* which provides that

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In *United States v. Hoth,* 207 F. 2d 386 (9th Cir.) the Court held:

> "The United States is not entitled any more than the ordinary litigant, to raise questions on the appeal not presented or suggested below."

In *Bateman v. United States*, 212 F. 2d 61 (9th Cir.) the Court held:

> "Under Rule 30 of the Federal Rules of Criminal Proceure, 18 U.S.C.A., failure to except to an instruction on the ground urged on appeal *forecloses review* of the question."

In *Reidy v. Myntti*, 116 F. 2d 725 (9th Cir.) the Court held:

> "This theory of the case, accepted by both parties at the trial, *cannot be questioned for the first time on appeal.* New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444, 37 L. Ed. 292." (Emphasis supplied).

In *Green v. United States*, 355 U.S. 184, the Court held:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." (Citing cases).

The policy of the law, which deprives the Government of the right to move for a new trial in the District Court and the right to appeal, likewise, precludes the Court of Appeals from entertaining a petition for a new trial after it has adjudicated that the defendant was entitled to judgment of acquittal as a matter of law.

In *Grunewald v. United States*, 353 U.S. at 406, the Government sought to sustain the conviction upon a "*further theory*" that the conspiracy contemplated continuous engagement in the business of tax fixing. The

Court *refused to entertain that contention because "the theory was never submitted to the jury."*

In the case at bar, the alleged "alternative theory" was not submitted to the Jury and the Court below should not have entertained the petition on that ground.

It is also well settled that a new contention cannot be presented for the first time, by a petition for rehearing.

> Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84;
> United States v. Achilli, 234 F. 2d 797 (7th Cir.), affirmed 353 U.S. 373.

If the Court of Appeals had affirmed the conviction, Petitioner could not have petitioned the Court of Appeals to send the case back for a new trial *upon another theory of defense which it could have, but did not, urge in the District Court*. There is no apparent reason why the Government should be granted this extraordinary right, particularly in a criminal case in which a defendant is entitled to the constitutional protection against double jeopardy and the Government is denied the right to move for a new trial in the District Court or the right of appeal from a judgment of acquittal.

In *National Association v. Alabama, ex rel. John Patterson*, — U.S. —, 79 S. Ct. 1001, the respondent State opposed the petition for writ of certiorari and attempt to sustain the action of the Court below on grounds which were not urged by Respondent in the Court below. This Court held:

> "The State is bound by its previously taken position, namely, that decision of the sole question re-

garding the membership lists is dispositive of the whole case."

c.

Re: Alleged Alternative Theory Parallel to Grunewald Case.

The Modification Opinion was based on the ground that the case "might" have been submitted on an "alternative theory"

> "closely paralleling the alternative theory in the Grunewald case . . ."

In the *Grunewald case*, the *defendant* was the appelland and *he* sought a new trial not the Government.

In the case at bar, the *Government* is *seeking a new trial* notwithstanding the fact that the law denies the Government a right to move for a new trial or to appeal.

In *Grunewald*, defendant requested submission of the alternative theory to the Jury in the District Court and that theory was, in fact, submitted. The only contention made on appeal was that the instruction did not adequately enable the Jury to separate the two theories and it was impossible to determine whether the verdict was based on one or the other. In the case at bar, the Government did not request submission of the alleged alternative theory and took no exception to the theory on which the case was submitted.

In *Grunewald*, defendant raised the issue of the sufficiency of the instruction submitting the alternative theory in the Court of Appeals. In the case at bar, the

Government did not present to the Court of Appeals the issue of submission of an alternative theory.

In *Grunewald*, the *defendant* had the right, as a matter of law, to raise the issue in the District Court, in the Court of Appeals and in the Supreme Court and to seek a new trial by reason thereof.

In the case at bar, the *Government* seeks a new trial when the law denies it the right to do so and predicates the application for a new trial on an issue which it never raised or submitted to the District Court or in the Court of Appeals until its petition for a new trial was filed. These distinctions clearly makes the *Grunewald case* inapplicable insofar as it is claimed to present a parallel alternative theory.

d.

The Modification Directing a New Trial Was Not a "Just" or "Appropriate" Judgment Under the Circumstances of This Case Within the Purview of Title 28, Section 2106.

Section 2106 of Title 28 U.S.C.A., insofar as it authorizes the Appellate Court to

> "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"

must *in criminal cases* be construed in connection with and limited by the Double Jeopardy Clause of the Fifth Amendment.

There are important and controlling reasons why the term "just" and "appropriate," as used in that statute,

must receive a construction *in criminal cases* different from civil cases. This follows from the impact of constitutional protection against double jeopardy in criminal cases and from the denial to the Government of the right to move for a new trial or to appeal in criminal cases except to the limited extent authorized by Title 18, U.S.C.A., Section 3731.

When a defendant in a criminal case becomes entitled, as a matter of law, to a judgment of acquittal and the right has accrued, it is not "just" or "appropriate" to subject him to another trial so that he can be prosecuted on another theory, especially so when that theory was never advanced in the Trial Court or even in the Court of Appeals on Defendant's appeal.

The fortuitous circumstance that the Trial Court erroneously denied the Defendant the judgment of acquittal to which he was entitled as a matter of law, cannot, and should not, affect his right to acquittal by direction of the Court of Appeals. On the contrary, it is "just" and "appropriate" that the Court of Appeals should direct the Trial Court *to do that which it should have done as a matter of law*. It is the only determination consistent with the constitutional protection against double jeopardy and denial to the Government of the right to a new trial and right of appeal in criminal cases.

Assuming that under Section 2106, Title 28 U.S.C.A., the Court of Appeals had discretion in determining the disposition to be made of the case, after it determined that the District Court erred in submitting the case to the Jury, it would still have to be a legal discretion or,

as Justice Minton said in *Johnson v. New York, N. H. & H. R. Co.*, 344 U.S. 48 (Dissenting Opinion), the discretion should be exercised so as to dispose of the case "according to law" and "on the record already made."

"According to Law." Petitioner was entitled to a judgment of acquittal in the District Court. It was, therefore, "just" and "appropriate" that the Court of Appeals should direct an acquittal when it determined that the District Court erred when it refused to acquit. The Court of Appeals was required to dispose of the case "on the record already made." There was no legal justification for sending the case back for a new trial so that a new record could be made.

In the *Johnson case*, this Court held the defendant to literal compliance with Rule 50(b) of the Federal Rules of Civil Procedure. It refused to relieve the defendant from its failure to make a motion for judgment notwithstanding the verdict although, under the Rule, there was an automatic reservation of decision on defendant's motion for a directed verdict.

There is no apparent reason why the Government, in this case, should be relieved from its failure to comply with Rule 30 of the Federal Rules of Criminal Procedure which required the Government to seek submission in the District Court on any theory it deemed appropriate.

The Government was content to go to the Jury on the theory on which the case was submitted and in the Court of Appeals it insisted upon affirmance of the judgment of conviction on the record as made and the in-

structions as given. It was only after the Court of Appeals reversed the conviction and directed a judgment of acquittal that the Government sought a new trial so that the case might be tried on an alternative theory. This course of procedure obviously lacks any element of justice or fairness.

We submit that this is a proper case for the exercise of this Court's supervisory powers so that adherence to the Federal Rules of Criminal Procedure by the Government will be made mandatory as it is upon the defendant. The Government's failure to proceed according to law should not be condoned, especially when the violation, if condoned, would result in depriving the defendant of the constitutional protection against double jeopardy.

In *Pollard v. United States*, 352 U.S. 354, in the dissenting opinion of Chief Justice Warren, concurred in by Justices Black, Douglas and Brennan, he said:

> "The conclusion that the condonation of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways."

Section 2106 cannot constitutionally be construed as granting to the Appellate Court discretion whether to direct a new trial or a judgment of acquittal upon reversal of a judgment of conviction in a criminal case when the reversal is based on the ground that it was error to submit the case to the Jury for want of sufficient evidence.

II

The Original Decision Was Correct. The Alleged "Alternative Theory," Projected in the Modification Opinion,

(a) Is Contrary to and Dissipates the Principles Established in the Grunewald Case; and

(b) Is Not Supported by Evidence.

a.

Re: Legal Effect of "Alternative Theory."

The Court below held, in the Modification Opinion, that prosecution would not be barred by the statute of limitations under the alleged "alternative theory."

That "theory" is predicated on the allegations in paragraph D of the Indictment (R. 5) and on overt acts 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18) (Mod. Op., R. 1937).

The *sole objective of the conspiracy*, as therein alleged, was to make false statements and submit false records to employees of the Treasury Department to conceal SEIJAS' "attempt" to evade his tax.

The Government disclaimed, in its petition for modification, any conspiracy to attempt to evade by filing false income tax returns. It said, in its petition (Page 15, Appendix to Government's Brief in Opposition to Petition for Writ of Certiorari):

> "These acts (filing false returns) are not even alleged as means of evasion in the indictment, but are relegated to the category of overt acts. *The*

means of evasion alleged in the charging part of the indictment are . . . . .

> by furnishing officers and employees of the Treasury Department false books and records, and false financial statements . . . . for the purpose of concealing . . ."

The filing of a false return has been adjudged, in many cases, to be the "completion" of the substantive offense of "attempt" to evade the tax.

In the *Grunewald case*, 353 U.S. at page 407, the Court said:

> "The tax evasion cases were governed by a six-year statute of limitations . . . . *which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers.*"

In *Herzog v. United States*, 235 F. 2d 664-667 (9th Cir.), the Court held:

> " 'the filing of the income tax return itself is a completed offense under the statute.' "

Other cases, so holding, are:

Canton v. U. S., 226 F. 2d 313 (8th Cir.);
Hayes v. U. S., 227 F. 2d 540 (10th Cir.);
U. S. v. Rosenblum, 176 F. 2d 321 (7th Cir.);
U. S. v. Raub, 177 F, 2d 312 (7th Cir.);
U. S. v. Yeoman-Henderson, Inc., 193 F. 2d 867 (7th Cir.);
U. S. v. Croessant, 178 F. 2d 96 (3rd Cir.).

The Government now seeks to avoid the effect of that "attempt" by labeling it an "overt act." This is obviously a "tour de force" in another effort to undermine the policy which this Court established in the *Grunewald and Krulewitch* cases that the statute of

limitations cannot be prolonged by alleging the commission of acts of concealment after an offense has been committed.

The Modification Opinion has important and far reaching effects beyond the question whether Petitioner is to be subjected to double jeopardy. It involves the impact on the "policy" and principles this Court established in the *Grunewald and Krulewitch cases* concerning the application of the statute of limitations in conspiracy cases.

If the Modification Opinion is allowed to stand, it will sanction and restore the "implied" subsidiary conspiracy theory, rejected by the Court, and the consequent evils sought to be avoided. It says, in effect, that acts of concealment of the commission of an offense, prolong indefinitely the operation of the statute of limitation without an "express original agreement to act in concert" to conceal.

The original Decision of September 15, 1958, was correct. It was in harmony with and gave effect to the policy established in *Grunewald*.

The alleged "alternative theory" (based on the commissions of acts of concealment, after the substantive offense of "attempt" to evade the tax was committed by the filing of a willfully false return)

> "would extend the life of the conspiracy indefinitely"

and

> "would for all practical purposes wipe out the statute of limitations in conspiracy cases." (*Grunewald*, page 402).

There is no substantive offense of tax evasion defined by statute. Only "attempt" to evade is defined as the offense. *Spies v. United States*, 317 U.S. at 499. Consequenly, when the willfully false return is filed, the object of the conspiracy to "attempt" to evade is completed and the subsequent acts of concealment "after the crime begins to come to light" do not prolong the operation of the statute of limitations in the absence of the "express original agreement" to "continue to act in concert to cover up . . ." described in *Grunewald*.

In *Spies v. United States*, 317 U.S. 492, the Court said, at pages 498-499:

> "This (attempt to evade) is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder."

Subsequent acts of concealment may subject the actors to prosecution for many offenses defined in the Internal Revenue Code and in the Criminal Code, but are not effective to prolong the statute of limitations applicable to conspiracy cases.

In the case at bar, when the false return was filed, the "attempt" was complete and the conspiracy consummated whether the Government calls the act of filing the false return an "attempt" or an "overt act." Nothing is added to its criminality by the subsequent acts of concealment. The statute of limitations as to the conspiracy to "attempt" commenced to run when the false return was filed in the absence of the "express original agreement" described in *Grunewald*.

The alleged false statements and submission of false records (if made) are relevant only insofar as they tend to conceal the "attempt" already made by the filing of false returns. They were made in relation to and during investigation of the falsity of the returns. *They are not independent "attempts" to evade*, dissociated from the returns already filed. Paragraph D of the indictment, and the overt acts relied on, themselves show that the alleged false statements and false records were made with respect to the returns already filed.

In Paragraph D of the Indictment (R. 5), it is specifically alleged that the false statements and false records were made

> "for the purpose of concealing from the Treasury Department their share of the *unreported* income . . ."

In Act No. 24 (R. 15), it is alleged that the false records were submitted in connection with the

> "official re-examination of the information returns."

The allegations in Acts Nos. 26, 29, 30, 31, 32 and 33 (R. 16 to 18) similarly relate the alleged false statements and false records to the income "unreported" in the filed returns.

It is obvious from all of these allegations, singly or collectively, that the making of the alleged false statements are not *independent "attempts" to evade*, but are acts of concealment of the "attempt" already made by the filing of the returns.

We cannot ignore the fact that the false returns

were filed before the alleged false statements were made, and treat the case as though no returns were filed and the attempt to evade is predicated solely on the false statements as in the *Beacon Brass* case (344 U.S. 43) where the decision involved the sufficiency of the indictment which *alleged the false statements only* as an attempt and no reference to the filing of returns was made in the indictment.

This Court was asked in the *Beacon Brass case* to pass upon the effect of the filing of a false return on the application of the statute of limitations, but the Court declined to pass on the question because it was not presented by the indictment which did not allege that a false return was filed prior to the making of the false statements.

In the case at bar, the question is properly before the Court. The case is before the Court on a record which establishes that an "attempt" was made to evade by filing a false return and subsequently alleged false statements were made to a Treasury employee to conceal the attempt already made.

The acts of concealment (overt acts 24, 26, 29, 30, 31, 32 and 33) by which the Government seeks to extend the operation of the statute of limitations are of the same character as the acts of concealment (paragraphs 7 to 13 and others) in the *Grunewald case*.

In the case at bar, the Court below could not lawfully have instructed the Jury (had the Government so requested) that the acts of concealment by making false statements, would extend the operation of the

statute of limitations *in the absence of an express original agreement of the kind described in the Grunewald case.*

In *Grunewald,* the Court rejected the contention

> "that the very same acts of concealment should be used as circumstantial evidence (although there was no express original agreement to act in concert, etc.) from which it can be inferred that there was from the beginning an 'actual' agreement to conceal"

and that

> "a conspiracy to conceal is being (can be) implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Matters in parenthesis added).

The petition for a new trial presents another adroit attempt to "extend the life of a conspiracy indefinitely," notwithstanding the fact that this Court has warned that

> ". . . we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." (*Grunewald case*).

In support of the alleged "alternative theory," the Court below, in the Modification Opinion, approved the Government's contention that the conspiracy to evade the tax continues as long as the tax remains unpaid because (R. 1937)

> "In the case of a false or fraudulent return there is no limitation of time for collection of tax."

The statute of limitations applicable to criminal conspiracy to evade the tax contains no exception similar to

the exception contained in the statute of limitations applicable to the enforcement of civil tax liability.

The Modification Opinion, in effect, amends the criminal statute of limitations by importing the exception contained in the civil statute of limitations into the criminal statute of limitations. The Court below says, in effect, *after a taxpayer has paid his tax liability*. he can have the benefit of the criminal statute of limitations, but *if he has not paid* the tax liability, he is to be deprived of the benefit of the statute of limitations and remain subject to prosecution indefinitely.

In summary, the allegations in paragraph D and the allegations of overt acts 24, 26, 29, 30, 31, 32 and 33, even if supported by evidence, do not warrant submission of the case to a Jury on the alleged "alternative theory" because the theory precludes the necessity of the

> "express original agreement . . . to act in concert . . . to cover up . . ."

Thus far, we have discussed the effect of paragraph D and the overt acts numbered 24, 26, 29, 30, 31, 32 and 33 as though there was evidence to sustain the commission of these acts.

We will now demonstrate the utter lack of evidence to support these allegations.

b.

There Is No Evidence of Any Conspiracy Between Seijas and Forman That They Would Make False Statements and Submit False Records to Treasury Employees to Conceal Seijas' Tax Liability.

Since the making of false statements and submission of false records to Treasury employees was the sole objective of the conspiracy and the sole means by which it was to be accomplished, "we must put aside" all evidence relating to all other acts which might constitute "attempts" within the meaning of Section 145(b) and all "evidence must be channeled" into the objective of making false statements and submitting false records. (*Yates v. U. S.*, 354 U.S. at 324-328). *"All evidence, relating to objectives barred by the statute of limitations, "must be excluded."* (*Yates v. U. S.*, supra: *U. S. v. Kuzma*, 249 F. 2d 619-621 (3rd Cir.).

There certainly is no direct evidence of such an agreement or "original" conspiracy. Neither the Government nor the Court below even suggested the existence of such evidence.

Neither is there any evidence from which such an original agreement or conspiracy can be inferred beyond a reasonable doubt.

The Court below only pointed to alleged *overt acts* in 1948, 1951 and 1952 in support of the alternative theory.

The Court of Appeals, in its Modification Opinion, (R. 1937) said that

> "Certain of the *overt acts* listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion."

The acts, referred to by the Court, are the alleged overt acts numbered 24, 26, 29, 30, 31, 32 and 33 (R. 15 to 18). They are the only ones that alleged interviews between Defendants and Treasury employees.

Assuming, without admitting, that there is evidence that the alleged acts were committed, they are, as a matter of law, insufficient to establish that Defendants conspired to commit said acts. On the face thereof, they merely alleged that each Defendant made false statements when interviewed by a Treasury employee. But there is a total absence of any evidence that either one of the Defendants did so pursuant to any antecedent agreement or conspiracy that they would make false statements, etc. if interviewed by Treasury employees.

The commission of those specific acts might tend to prove the commission of the *substantive offense* of "attempt" to evade Seijas' tax. But it does not follow (in the absence of an express agreement of the kind described in the *Grunewald case*) that the alleged false statements were made pursuant to a pre-existing conspiracy that they should do so. To make the alleged "alternative theory" available to the Government, there had to be evidence of the existence of an

> "express original agreement among the conspirators to continue to act in concert in order to cover

> up, for their own self-protection, traces of the crime after its commission." (*Grunewald case*).

(*Grunewald case*, quoted in the original Opinion, R. 1934).

It is now well settled, by the decisions of this Court in the *Lutwak, Krulewitch and Grunewald cases*, and in many Court of Appeals cases, that *evidence of overt acts* does not constitute evidence of *conspiracy* to commit the acts contemplated by the objective of the conspiracy.

Evidence of the commission of acts by either or both Defendants, tending to prove a substantive offense, does not establish that they did so pursuant to an antecedent conspiracy to commit the acts. There must be independent evidence of the conspiracy to accomplish the specific objective.

For example: In the *Lutwak case*, 344 U.S. 604-616, 73 S. Ct. 481-488, the Court held:

> "There was a statement of Munio Knoll in the record to one witness Haberman that indicated Munio's purpose to cover up and conceal the conspiracy. *This is not evidence that the conspiracy included the further agreement to conceal.* It is in the nature of an after-thought by the conspirator for the purpose of covering up." (Emphasis supplied).

In the *Grunewald case*, 353 U.S. at p. 404, this Court rejected the contentions that

> "The very same acts of concealment"

can

> "be used as circumstantial evidence from which it

> can be inferred that there was *from the beginning an 'actual' agreement to conceal* . . . conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." (Emphasis added).

In *Weniger v. United States*, 47 F. 2d 692 (9th Cir.) the Court held:

> "Neither will the commission of an overt act though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

In *Marino v. United States*, 91 F. 2d 691 (9th Cir.) the Court held:

> "An overt act is something apart from the conspiracy."

c.

Re: Evidence to Support Overt Act.

Re: Overt Act 24

Overt Act 24 alleged that on or about December 1, 1948, Seijas presented to a Treasury employee in connection with his "official examination" of the partnership returns, books and records which understated the partnership income. There is no evidence by any Treasury employee:

(a) that he was engaged in an "official reexamination" of any partnership returns *on or about said date;*

(b) that he had any interview with Seijas *on or about that date.*

There is evidence in the record of a report by a Revenue Agent Clodfelter (Pl. Ex. 42, R. 661, 1960 to 1963) dated December 9, 1948, relating to Seijas' return, but it shows on its face that it is *unrelated to overt act number 24*. It involved "reclassifying a portion of the long-term capital gains into short-term capital gains" (R. 1963). The report did not involve any "official re-examination" of the operating "hold-out" income which is the subject matter of the alleged conspiracy. Revenue Agent Clodfelter testified with respect to this report and examination that he did not ask for all of the records of the Amusement Company and that *he did not make any inquiry into the income* (R. 1343). He testified that the question of the treatment of the sale as a long-term or short-term capital gain arose from the question whether or not any part of the purchase price was paid "for an agreement not to compete."

The inquiry whether any consideration was paid for the "agreement not to compete" in the sale of the capital asset (pin ball route) was entirely foreign to the question whether the books correctly reported the operating "hold-out" income. He also testified that he made no inquiry as to "whether or not all of the revenue was reported" because he was "there to investigate only the things (that you) described" (long-term or short-term capital gain, referred to above). The investigation was "limited to that subject matter" (R. 1348).

This Act is not relevant to the specific objective of the conspiracy alleged in the indictment or in furtherance thereof.

Re: Overt Acts 26 and 29.

Acts 26 and 29 are in fact the same except that *26* relates to the tax years 1944 and 1945 and *29* relates to 1945 alone. Both involve the *same interview on the same date* and *the same alleged Act*. They allege (R. 16-17) that on or about *September 1, 1948*, while a Treasury employee was

> "engaged in an official examination of his (*Forman*) and his wife's income tax returns,"

Forman "concealed" that *he* (not Seijas) received income from the Partnerships in addition to that shown on the information returns.

(a) There is no evidence in the record of any interview between Forman and any Treasury employee *on or about September 1, 1948*.

(b) Even if Forman had committed the act described therein, it would not be an overt act in furtherance of the conspiracy objective described in paragraph D of the indictment which charged an attempt to conceal *Seijas' tax only*. Any misstatement that Forman may have made in an interview *concerning his own tax liability*, could not, as a matter of law, be an act in furtherance of a conspiracy to conceal *Seijas' tax liability*. The interview involved "an official examination" of *Forman's tax liability* and not that of *Seijas' tax liability* and it is so alleged (R. 16 and 17).

(c) There is no evidence that the statements made at the interview were pursuant to an antecedent conspiracy to make false statements, etc.

The allegations in Acts 26 and 29 merely purport to show that Forman individually "concealed," (does not say how) at that interview, *his own* tax liability and *not Seijas'* tax liability.

Re: Overt Act 30.

Overt Act 30 alleges that on *September 1, 1948*, Seijas "concealed" from a Treasury employee engaged in an *official re-examination* of his returns; that he received income from the pin ball Partnerships in addition to the amount shown by the Partnership returns.

There is no evidence of any interview between Seijas and any Treasury employee *on or about Stepember 1, 1948*.

Thre is no evidence that any Treasury employee was engaged in an "*official re-examination*" of Seijas' return *on or about September 1, 1948*.

There is no Revenue Agent's Report showing any interview with Seijas *on or about September 1, 1948*.

Re: Overt Acts 31, 32 and 33.

The Acts Described in Acts Numbers 31, 32 and 33 Are Not Relevant to or in Furtherance of the Conspiracy to Make False Statements Concerning Seijas' Tax Liability for the Years *1942 to 1945*.

Acts 31, 32 and 33 may be considered together. They involve substantially one act.

The tax years involved are *1942 to 1945* inclusive. (Ind. R. 5).

The net worth statement involved in Act 31 was submitted and the alleged false statements, referred to in Acts 32 and 33, were made to Treasury employees while engaged in an "official examination" of Seijas' returns for the years *1946, 1947 and 1948.*

Act relating to the tax years *1946, 1947 and 1948* cannot, as a matter of law, be deemed to be in furtherance of a conspiracy involving the tax years *1942 to 1945.*

While Revenue Agents Oftedal and O'Leary were investigating Seijas' tax returns for the tax years *1946 to 1948,* they requested Seijas to submit a net worth statement. Seijas' accountant Whittle prepared the net worth statement (Pl. Ex. 74, R. 247, 1976).

On December 29, 1951 (Act 31), Revenue Agent Oftedal obtained the net worth statement together with the letter of transmittal attached therteo from the accountant. The net worth statement disclosed unreported income for the tax years *1946 to 1948* as follows:

1946	$ 35,632.56	
1947	22,682.43	
1948	107,321.39	
Total	$165,636.37	(R. 1981).

They subsequently "invited" Seijas and the accountant Whittle to discuss the statement (R. 1472).

Revenue Agent Oftedal testified (R. 1472):

"Q. And what was the subject of that interview?

A. They was basically to find out the sources of income which had apparently been unreported by Mr. Seijas for the period *'46, '7 and '8* as reflected by his net worth statement.

. . . . . .

(at R. 1508)

Q. Now, the purpose of this meeting was to discuss an apparent unreported income or tax liability for the years *1946, '7, and '8*, was it not, sir?

A. Yes, sir.

Q. And the liability of Seijas was focused on those years?

A. Yes, sir.

Q. Is that right?

A. That's right.

Q. And the *purpose* of the meeting was *to attempt to secure*, if possible, an *explanation* for this *unreported income as shown by the Whittle statement?*

A. Yes.

(at R. 1510)

A. Ours was a more general type of discussion attempting to find out why there was a $165,000 of unreported income *in the three year period* (1946 to 1948).

Revenue Agent O'Leary testified (R. 1591):

"Q. Now, if you were making a routine investigation in April of 1950 of Mr. Seijas' returns, what particular years were you investigating, sir?

A. Well, I began the investigation—I had his tax return for the year *1948*, and I believe also *1947*, and I expanded it after that.

Q. 1948 and 1947 were the ones that you were making a routine check on, is that right?

A. I didn't consider the investigation routine, but at the time I first called on him, I had his 1948 returns and I believe it was his '47 returns, and that was what he was so informed. *They were the ones that were under investigation.*"

The net worth statement was not submitted and the interview of January 11, 1952, was not held in connection with any "official examination" or investigation of

Seijas' tax liability *for the tax years 1942 to 1945, the years involved in this case.*

Plaintiff's Exhibit 139-A (R. 1990) is a transcript of the interview. It discloses that the Revenue Agents were endeavoring to get Seijas to admit that he had unreported income in the sum of $165,636.39 in the years *1946 to 1948* as shown in the net worth statement and the entire interview was directed to that end.

Paragraph D of the Indictment (R. 5) charges a composite conspiracy to violate Section 1001, Title 18, Criminal Code, and Section 145(b) of the Internal Revenue Code.

Under Section 1001 of the Criminal Code, the false statement must be a "matter within the jurisdiction of" the Agent to whom the statement is made and the false statement must, in any event, be material to the subject matter under investigation.

In *Weinstock v. U. S.*, 231 F. 2d 699 (U.S.C.A., D. of C.) the Court held:

> "The first clause of the foregoing statute requires that the statement of the accused be false as to 'a material fact', and we held in Freidus v. United States, 223 F. 2d 598, in respect to the whole section, that 'this highly penal statute must be construed as requiring a material falsification.'"

We submit that the net worth statement submitted and the alleged false statements made in connection with the investigation of Seijas' unreported income for the years *1946 to 1948* are not, as a matter of law, relevant to and in furtherance of a conspiracy involving Seijas' tax liability for the tax years *1942 to 1945*. Since

the years 1942 to 1945 were not under investigation, any incidental statement made relating to those years cannot be said to be in furtherance of a conspiracy to make false statements concerning Seijas' tax liability for the year *1942 to 1945*.

The Net Worth Statement, Referred to in Overt Act 31, Was Not a False Statement.

The essence of Overt Act 31 is that the net worth statement

> "concealed the fact that he (Seijas) had on hand on December 31, 1945, a very large amount of currency representing his share of the diverted and unreported receipts of the aforementioned pin ball operations." (R. 18).

The net worth statement was not false in that respect. It actually shows that Seijas had "cash on hand on December 31, 1945" the sum of $50,432.57 in addition to the several bank accounts shown in the forepart of the "Comparative Net Worth Statement" (Pl. Ex. 74, R. 1980, 1981). In the interview, he stated, "there is a possibility" that he could have had

> "more than $50,000.00 in cash on hand, in the banks at the end of 1945." (R. 1995).

Throughout the interview, he insisted that the unreported income, appearing as *1946 to 1948* income, was in fact *1942 to 1945 income*.

The net worth statement was accompanied by a letter of transmittal which was attached to the statement (R. 1976). The letter cautions that the net worth state-

ment was not to be taken as an accurate statement of the income for any one of the years included in the statement. *The letter states that the statement is inaccurate* insofar as it allocates all of the unreported income to the tax years *1946 to 1948* and that the statement is correct only insofar as it discloses a *total* of the unreported income for the entire nine year period. The letter also explains that the income, allocated to the years 1946 to 1948, must in whole or in part be allocated to the earlier period 1942 to 1945 so that while the net worth statement, on its face, shows no unreported income for the 1942 to 1945 period, the letter demonstrates that there was in fact unreported income in the 1942 to 1945 period involved in the case at bar.

The allocation to the tax years *1946 to 1948* were made because certain assets were purchased in those years and it was *assumed* that the funds, with which the assets were acquired, were earned in those years for the purpose of making the net worth statement. But it is made clear in the letter and in the accountant's testimony that it was not intended to establish that the funds with which the assets were acquired were earned in those years and they clearly demonstrate that the funds must have been earned in the earlier period 1942 to 1945. The letter says:

> "The net worth statement . . . is therefore *not sound* without giving effect to what additional cash could be correctly shown as at the close of each of the years . . ." (R. 1977).

It goes on to say (R. 1977):

> "It is quite obvious, by reference to the net

worth statement, that the assets owned during the period from 1941 to 1945 inclusive could produce more cash than that shown, while assets acquired in 1948 in an amount in excess of $100,000.00 over that of year 1947 could not have produced such an income to acquire such an increase in assets.

. . . . . .

"It is utterly *impossible for us or the taxpayer to state* that the *first four years 1942 to 1945*, inclusive, *are correct* because by the end of 1945, taxpayer was out of the pin-ball machine business, and it is likewise impossible to state that the last four years 1946 to 1949, inclusive, are correct since no such money could be earned from those assets as was used to acquire assets.

. . . . . .

"It is our opinion that the net worth at December 31, 1941 and December 1, 1949, . . . is approximately correct, *but the years in between the aforesaid two dates could be subject to adjustment.*" (R. 1979).

Examination of the transcript of the interview (R. 1990) discloses that it was directed entirely to inquiry concerning the 1946 to 1948 period.

The net worth statement cannot be divorced from the letter of explanation which accompanied it and when considered together, demonstrate clearly that it was not submitted as a true statement of the income for the years 1942 to 1945.

When read together, they *amount to an admission* that Seijas had unreported income in the period *1942 to 1945* and is not a false statement to the effect that he had no unreported income in that period.

Re: Oral Statements Made on January 11, 1952.

It was agreed that "this (interview of January 11, 1952) was going to be *an informal discussion*" and that the statements made at the interview were *not to be under oath* (R. 1990, Pl. Ex. 139-A).

Revenue Agent Oftedal described it as

> "a more general type discussion attempting to find out why there was a $165,000 of unreported income in the three year (1946 to 1948) period." (R. 1510).

In the opening of the interview, Mr. Oftedal made the statement,

> "When your statement is completed it will be typed and you will be given an opportunity to read it and make any necessary corrections and you will be given a copy. Should you so desire, we will gladly allow you a subsequent opportunity to present any information or oral testimony that you desire on any points which may not be fully covered on this occasion." (R. 1990).

These precautionary measures clearly demonstrate that it was not the intention that anything Seijas might say at the interview should be treated as a *representation* or *statement of fact* upon which action or non-action would be predicated. It was to be an exploratory discussion in an attempt to determine the allocation of the unreported income shown on the net worth statement to particular years.

Consequently, anything that was said by Seijas at that interview, even if incorrect, *cannot be treated as false statements and as overt acts in furtherance of a conspiracy to conceal*. At most, they can be regarded

only as inaccuracies due to lack of knowledge, recollection, or understanding of the facts. There is, of course, a vast distinction between inaccurate statements and false and fraudulent statements within the purview of Section 1001 of the Criminal Code and Section 145(b) of the Internal Revenue Code.

The interview as reported in the Exhibit shows that it was in reality a four-party conversation between Revenue Agents Oftedal and O'Leary, Seijas and Whittle, in which all asked questions and "opinions" and conclusions were sought and expressed.

In *United States v. DeLucia*, 262 F. 2d 610 (7th Cir.), the Court described a similar interview with Internal Revenue Agents as follows:

> "Actually this meeting amounted to a little more than verbal fencing between DeLucia's attorneys and the Internal Revenue Agents."

The question whether the phrases, referred to in the overt acts, constituted statements of fact and the question of falsity, cannot be determined by extracting a phrase out of context of the sentence in which it is used or the context of the entire interview. That must be determined from consideration of the entire interview. *Conrad v. U. S.*, 255 F. 2d 247 (5th Cir.). The Court said in that case:

> "the last line of his statement and the last syllable of his testimony was as important as the first. For until all was heard and considered, one could not determine whether such testimony or such statement 'in substance and effect' affirmed or denied these critical facts."

In *U. S. v. Davey*, 155 F. Supp. 175, the Court held that an answer "No" to a question propounded by an FBI Agent when defendant was "interviewed informally" and *not under oath*, did not constitute a false statement within the meaning of Section 1001, Title 18, Criminal Code.

The transcript of that interview (R. 1990) demonstrates clearly that the Revenue Agents were endeavoring to have Seijas admit that the unreported income shown on the net worth statement was earned in the years *1946 to 1948* (the years they were investigating), while Seijas and Whittle were constantly insisting that it could not be allocated to those years; that he did not and could not have earned any such money in those years and that it must be allocated to the earlier period 1942 to 1945.

Instead of denying that he had unreported income in the years in question, 1942 to 1945, the interview, in effect, was *an admission* that he had unreported income in those years and consequently the oral statements, described in Overt Acts 32 and 33, cannot be deemed to be false and are not acts in furtherance of a conspiracy to conceal the income for the years 1942 to 1945.

The record also establishes that, consistent with Seijas' admission at that interview that he had unreported income in the earlier period 1942 to 1945, he later made a complete disclosure thereof to Woolvin Patten, Enforcement Counsel of the Internal Revenue Bureau, and the indictment in the case at bar is a direct result

of those admissions (Patten's testimony, R. 1690 to 1705).

Taking the net worth statement, the accompanying letter and transcript of the interview all together, it is clear that (a) Overt Acts 31, 32 and 33 are not acts in furtherance of a conspiracy to conceal Seijas' tax liability for the *years 1942 to 1945* and are irrelevant thereto; and (b) there is no evidence of falsity of the net worth statement or the oral statements made at the interview and consequently do not constitute overt acts in furtherance of the conspiracy alleged in paragraph D of the Indictment.

Seijas had a distinct purpose in admitting that the unreported income for the years 1946 to 1948, as shown in the net worth statement, was in reality 1942 to 1945 income. As the net worth statement stood, he was guilty of tax evasion for the years 1946 to 1948, the period then under investigation, and constituted an admission of his guilt for that period. He had already been informed that prosecution was contemplated for those years. But by allocating the income to the 1942 to 1945 period, he thought he would avoid prosecution because those years were barred by the statute of limitations. He consequently admitted tax evasion in the earlier 1942 to 1945 period and denied tax evasion in the later 1946 to 1948 period. He admitted this in his interviews with the Regional Counsel and in his testimony in this case.

An admission of tax liability and evasion in the 1942 to 1945 period cannot be converted into a false statement that would conceal tax evasion in those years.

As was said by the Court in *Lutwak v. U. S.*, 344 U.S. 604,

"This is not concealment. It is disclosure."

The essence of Overt Act 32 is that at the January 11, 1952, interview, Seijas stated

"he sincerely believed his income for the years 1942 to 1945, inclusive, had been correctly reported . . ."

The transcript of the interview shows that this phrase was taken out of context and divorced from the explanations he made throughout the interview. Here, also, the statement must be read in its entirety. *Conrad v. U.S.*, supra.

He was asked (R. 1991):

"Is it your sincere belief that you had properly reported it for income tax purposes up to 1945?"

and he answered:

"Yes, it is my belief, and that I paid the tax on it, and wherever there was a mistake the Internal Revenue Department corrected it." (R. 1991).

At most, this was a opinion and not a statement of fact.

But this statement must be read together with the additional statements he made at the interview in which he insisted that the purported 1946 to 1948 income was, in reality, 1942 to 1945 income.

The essence of Overt Act 33 is that Seijas stated at the January 11, 1952, interview that

". . . he had no knowledge concerning the source of a large amount of unexplained assets and funds which were discovered in his possession, . . ."

The transcript of the interview (R. 1990) does not disclose that he made any such statement. He was not asked to state the source of his assets and funds and he did not state that he had no knowledge thereof.

The transcript of the interview and the net worth statement *disclose in great detail all of the assets acquired and the time of acquisition* (R. 1980 to 1991). He merely stated that he could not state in what particular year he earned the income with which a particular assets was purchased. But he was quite certain that it was not earned in the years 1946 to 1948 and that it was earned in the earlier period.

Consequently, there is no evidence of falsity of the statement attributed to him in Overt Act 33.

Seijas, who was the Government's principal witness, testified on direct examination:

> "Q. Had you prepared then or caused to be prepared this net worth statement as a true statement of its contents?
>
> A. No.
>
> Q. Did you present it as misrepresenting its contents?
>
> A. No.
>
> Q. How, sir, did you present this or cause to be presented this net worth statement to the agents?
>
> A. We presented that as a *preliminary statement only in which Mr. Whittle had made a statement in the form of a letter which he explained that the proposed net worth statement was not in keeping with his thinking or his deductions in the preparation of that statement.*"

In *Langer v. United States*, 76 F. 2d 817 (8th Cir.) the Court held:

"'Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement.'" (Cases).

In *Tingle v. United States*, 38 F. 2d 573 (8th Cir.) the Court held:

> "It is apparent from the record before us, and was, in effect, assumed at the hearing, that appellant was guilty of a substantive violation of the National Prohibition Act (27 USCA). That, however, standing alone furnishes no support to a conspiracy charge."

No evidence, other than the said overt acts referred to above, was pointed out by the Government or the Court below to sustain a finding beyond a reasonable doubt that the acts were committed pursuant to an antecedent conspiracy or agreement "to act in concert", etc, and since evidence of the commission of overt acts themselves do not constitute evidence of conspiracy, there is a total failure of proof of any conspiracy that would prolong the statute of limitations.

In summary:

(a) There is no evidence of an agreement between Seijas and Forman to act in concert to make false statements and submit false records to conceal Seijas' tax evasion.

(b) None of the seven alleged overt acts were relevant to or in furtherance of the alleged conspiracy to conceal Seijas' tax liability;

(c) There is a failure of proof to establish the alleged acts beyond a reasonable doubt; and

(d) No overt acts were established that prevented the statute of limitations from beginning to run on March 15, 1946.

CONCLUSION

The decision of the Court below, rendered October 27, 1958, modifying its decision rendered September 15, 1958, by directing a new trial instead of directing the entry of a judgment of acquittal, and the decision of the Court below, rendered February 26, 1959, denying Petitioner's Petition for a Re-Hearing, should be reversed with directions to reinstate the decision of September 15, 1958, and directing the entry of a judgment of acquittal.

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